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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 178

STATE TAX COMMISSION OF UTAH, *Petitioner*,

vs.

PACIFIC STATES CAST IRON PIPE CO., a corporation, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

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INDEX

	Page
Citations to opinions below	1
Jurisdiction	2
Question presented	2
Constitution and statutes involved	2
Statement of the case	3
Reasons for granting the writ	5
Conclusion	9
Appendix — Opinions and judgment below:	10
I. Decision of the State Tax Commission of Utah	10
II. Opinion of the Supreme Court of Utah	15
III. Judgment of the Supreme Court of Utah	26

CITATIONS

CASES:

Central Transportation Co. v. Atkins, 202 Tenn. 512, 305 S.W. 2d 940, cert. denied 355 U.S. 913	6
Denver & R.G.W. Ry. Co. v. State Tax Commission, 11 Utah 2d 301, 358 P.2d 352, cert. denied 368 U.S. 830	6
Dept. of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62	6, 8
Eastern Air Transport v. South Carolina Tax Commission, 285 U.S. 147	6
International Harvester Co. v. Treasury, 322 U.S. 340	6, 8
Superior Oil Co. v. Mississippi, 280 U.S. 390	6

CONSTITUTION:

Federal Constitution, Art. I, Sec. 8	2

STATUTES:

Utah Code Annotated, 1953, as amended	
Section 54-6-9	4
Section 59-15-2(b)	8
Section 59-15-4	2, 5

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

The State Tax Commission of Utah prays that a writ of certiorari issue to review the judgment of the Supreme Court of Utah entered in the above entitled case February 20, 1962.

CITATIONS TO OPINIONS BELOW

The decision of the State Tax Commission of Utah (R. 0094) is unreported and is printed in the appendix hereto, *infra*, p. 10. The opinion of the Supreme Court of Utah (R. 0110) is reported in ..... Utah ....., 369 P.2d 123 (1962), and is printed in the appendix hereto, *infra* p. 15.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on February 20, 1962 (R. 0113); *infra*, p. 26. A timely petition for rehearing was filed March 12, 1962 (R. 0014). The petition was denied on March 26, 1962, (R. 0116). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), in that the validity of a state statute is drawn into question on the grounds of its being repugnant to federal law.

QUESTION PRESENTED

Whether a tax required under state law to be imposed on every consummated transaction of sale constitutes a violation of interstate commerce when imposed upon goods sold and delivered in Utah to a purchaser, and thereafter transported by said purchaser, pursuant to an agreement with the seller, to an out-of-state destination.

CONSTITUTION AND STATUTES INVOLVED

The case directly involves the following:

Article I, Section 8, of the Constitution of the United States, which reads in part:

> "The Congress shall have Power . . . (t)o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ."

Utah Code Annotated, 1953, pertinent sections of which provide:

> Section 59-15-4. EXCISE TAX—RATE. "From and after the effective date of this act there is levied and there shall be collected and paid:
>
> (a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to 2 per cent of the purchase price paid or charged. . ."

STATEMENT OF THE CASE

This case is an original proceeding in the Supreme Court of the State of Utah to review an order and decision of the State Tax Commission of Utah (referred to herein as the "Tax Commission"). The Tax Commission imposed sales tax liability upon the respondent, Pacific States Cast Iron Pipe Company (referred to herein as the "Pipe Company"), for sales made by it of cast iron pipe and related commodities to contractors within the State of Utah, which materials were subsequently transported outside the state in interstate commerce. The Utah Supreme Court reversed the Tax Commission's decision (R. 0113). The Tax Commission, as petitioner, now seeks review of that Court's decision.

The facts are not in dispute. They are substantially as found by the Utah Supreme Court in its opinion herein (R. 0110). Essentially, they show that respondent is a Nevada Corporation duly qualified to do business in Utah and is engaged in the manufacture and sale of cast iron pipe and related items. All of the sales, which are the subject matter of the Tax Commission's proposed deficiency, were solicited by means of quotations issued by the Pipe Co. to contractors bidding on various out-of-Utah jobs, and the materials sold under such quotations were purchased for use on specific out-of-state jobs and were of specified sizes and lengths to conform to the specifications covering the particular job involved (R. 0013).

The Tax Commission made subject to its deficiency assessment only those sales of cast iron pipe and related commodities purchased in the State of Utah wherein the contractor, or its agent, as purchaser, received delivery of the material purchased from the Pipe Company in the contractor's own trucks at respondent's plant in Ironton, Utah. In all instances herein, the purchaser thereafter

transported the materials out of the State of Utah in its own trucks.

It is conceded that the original quotations contemplated delivery of goods sold out of the State of Utah. However, the parties, by their subsequent correspondence, modified the original requirement of out-of-state delivery and agreed that delivery should be made to the buyer at the seller's foundry, f.o.b. Ironton, Utah (Exhibits 4(e), 5(e), 6(e), and 7 (e)). The invoices and bills of lading which represent these transactions further indicate that title passed within the State of Utah when the goods were delivered to the buyer at the place agreed upon (Exhibits 4(d), 5(d), 6(d), and 7(d), Contract Terms and Conditions, Secs. 1 (a)). Both vendor and vendee considered the cast iron pipe sold to be the exclusive property of the vendee at the time it took possession of the materials in its own vehicles at the foundry. The sellers were under no contractual obligation of any kind to deliver these materials across state lines (See Terms and Conditions set forth in Par. 4 on the reverse side of each of Exhibits 4(e), 5(e), 6(e) and 7(e)). The record shows that the contractors considered themselves to be carrying their own merchandise, and, as a consequence, did not obtain a certificate of convenience and necessity from the Utah Public Service Commission, required of all interstate contract motor carriers transporting property for hire (R. 0064; 0088-0089) (U.C.A., Sec. 54-6-9).

Based upon the stated facts in the record, the Tax Commission concluded that the respondent, under the laws of Utah, was responsible for the collection and payment of sales tax on all items sold by it and delivered to contractors within the State of Utah. It further concluded that title to all materials purchased from the Pipe Company and delivered to contractors within the State of Utah passed in the State of Utah and that the sales transactions which

constituted the subject matter of the deficiency assessment were not sales in interstate commerce. The deficiency against the respondent for the period January 1, 1957 to December 31, 1959 was sustained in the amount of $32,290.18 plus interest at the rate of 6 per cent per annum from January 1, 1957 until paid (R. 0094-0097).

A petition for writ of certiorari was timely filed with the Supreme Court of Utah (R. 0098), and in said petition the Pipe Company raised the federal questions, here sought to be reviewed, by asserting in said petition that the imposition of the tax was a burden upon interstate commerce, prohibited by the commerce clause of the United States Constitution (R. 0100). The Supreme Court of Utah reversed the decision of the Tax Commission and stated in its opinion the constitutional grounds which the Pipe Company had asserted, namely, that the state statute as applied under the facts of this case constitutes a burden on interstate commerce under Article I, Section 8, of the United States Constitution (R. 0111).

REASONS FOR GRANTING OF THE WRIT

1. The decision of the Utah Supreme Court is believed to be erroneous and in conflict with prior decisions of this Court. The tax in question is "(a) tax upon every retail sale of tangible personal property made within the State of Utah equivalent to 2 per cent of the purchase price paid or charged . . ." Section 59-15-4, U.C.A. 1953. The holding of the Utah Supreme Court is to the effect that passage of title and delivery of materials sold within the State of Utah is not subject to this sales tax if both seller and buyer agree that the products sold are to be shipped to an out-of-state destination in the buyer's own trucks. In other words, that a sale consummated within the state of

Utah is not taxable if use of the goods so purchased is contractually contemplated outside of the state of purchase.

As such, there is a direct conflict between this decision of the Utah Supreme Court and other decisions of this Court. The Utah Court has decided a federal question of substance in a way not in accord with applicable decisions heretofore rendered by this Court. The situation herein may be characterized as one wherein the passage of title, delivery or transfer of possession, took place within the State of Utah, but the goods so sold were thereafter transported out of state for use and consumption. This Court, in at least four other cases, has considered a similar factual situation, each time upholding a non-discriminatory sales tax or gross receipts tax on facts similar to these. These cases are: *Superior Oil Co. v. Mississippi*, 280 U.S. 390; *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62; *Eastern Air Transport v. South Carolina Tax Commission*, 285 U.S. 147; and *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340. In addition, the following cases involving similar situations have been decided in state courts in favor of the imposition of tax, and appeals by the losing parties have been carried to this Court, which denied certiorari to review the same. These cases are: *Denver & R.G.W. Ry. Co. v. State Tax Commission*, 11 Utah 2d 301, 358 P.2d 352, cert. denied 368 U.S. 830, and *Central Transportation Co. v. Atkins*, 202 Tenn. 512, 305 S.W.2d 940, cert. denied 355 U.S. 913.

The most recent Supreme Court case to consider the problem was *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340. In that case several categories of sales were subjected to tax by the Indiana Department of Treasury, only one of which is pertinent here; that is, the "Class D" sales or sales by Indiana sellers of Indiana goods to

out-of-state buyers who came into Indiana, took delivery there and then transported the goods out of the state immediately upon delivery. This Court said in that case, in sustaining the tax:

> ". . . a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." 322 U.S., at 346.

And concluded:

> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' . . . are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage." 322 U.S. at 349.

In the transactions herein, the actual contracts and transactions of sale upon which the Tax Commission levied its sales tax deficiency were consummated within the State of Utah. They became closed transactions of sale within the borders of that state. The evidence supports this conclusion. Passage of title and delivery of possession to the ultimate consumer-purchaser all took place within the State of Utah. Petitioner agrees that an out-of-state use was contemplated by the parties in most instances but contends that the buyer, having taken title and possession within the state, was by no means obligated to deliver the materials out of the state to himself; and, that even if such obligation can be found, it does not convert the closed transaction of sale into a sale in interstate commerce.

There can be no discrimination against interstate commerce by the Utah sales tax application, because under

Utah law, Section 59-15-2(b), U.C.A. 1953, the Utah tax only applies to closed transactions of sale. If a contract itself requires for its consummation the delivery across state lines, petitioner concedes that it cannot tax such a sale, for without delivery in Utah, a sale never becomes a closed transaction within the state. However, the transactions subjected to the tax herein do not fall within that category.

Even if the Pipe Company were bound by contract to deliver merchandise sold across state lines, petitioner submits that this is not controlling in view of the decision of this Court in *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62. In that case this Court ruled, where a sales contract calling for treatment of ties in Ohio nevertheless gave prior delivery to the taxpayer in Indiana, that out-of-state consignment was "not of consequence in light of the facts showing completed delivery to the Railroad Company in Indiana." The tax, therefore, was sustained.

2. Clearly, the question presented is of importance to all states' taxing authorities. If the decision of the Utah Court is allowed to stand, it will discredit the cited authorities, particularly *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340. Utah and other states will be faced with the difficult burden of extracting proof and evaluating claims that a purchaser intends to use the property purchased somewhere outside of the state, or that he is obliged to do so. In most cases, it will not be too difficult to show to the seller's satisfaction that such out-of-state use is intended or required. We cannot conceive that a state's right to tax should properly depend upon such considerations. The doubts raised in this state will likely be raised in other states which have similar sales tax statutes and, indeed, may result in a renewal of litigation by all parties who have assumed that the *International Harvester* case, *supra*, was controlling upon similar factual situations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINIONS AND JUDGMENT BELOW

I. Decision of the State Tax Commission of Utah

BEFORE THE STATE TAX COMMISSION OF UTAH

In the Matter of the Sales and Use Tax Liability of
PACIFIC STATES CAST IRON PIPE COMPANY

DECISION

The above entitled matter came on regularly for a hearing before a lawfully constituted quorum of the State Tax Commission of the State of Utah on the 4th day of January, 1961, upon petition and notice as required by law; and the petitioner, Pacific States Cast Iron Pipe Company, appearing by and through its counsel of record, C. Matthew Gilmour; and the State Tax Commission appearing by and through its counsel, F. Burton Howard; both parties having presented sworn testimony and documentary evidence in support of their respective positions, and the State Tax Commission having heard and reviewed the evidence herein and being fully advised in the law and the premises, hereby makes the following

FINDINGS OF FACT

1. That the petitioner, Pacific States Cast Iron Pipe Company is a Utah corporation qualified pursuant to Utah statutes to do business in the state of Utah and is engaged in the manufacture and sale of cast iron pipe and related items.

2. That on April 12, 1960 the State Tax Commission of Utah, through its Sales and Use Tax Auditing Division, proposed a sales tax deficiency against the petitioner in the amount of $34,192.62, together with interest to April 25, 1960, in the amount of $2,964.43, for a total sales tax deficiency of $37,157.05 as of the date of the deficiency.

3. That on April 12, 1960, the State Tax Commission of Utah, through its Sales and Use Tax Auditing Division, proposed a use tax deficiency against petitioner in the amount of $2,041.39, together with interest to April 25, 1960, in the amount of $112.93 for a total use tax deficiency in the amount of $2,154.32 as of the date of the deficiency.

4. That the sales tax deficiency was for the period of three years, January 1, 1957 to December 31, 1959; and the use tax deficiency was for the period January 1, 1956 to December 31, 1959.

5. That the above mentioned use tax deficiency has since been paid.

6. That on April 20, 1960 the petitioner, Pacific States Cast Iron Pipe Company, duly filed with the Tax Commission its protest and request for hearing before the Tax Commission.

7. That as a result of informal hearings held May 25, 1960 and October 27, 1960, certain items were eliminated from the original sales tax deficiency so that the only transactions now subject to this deficiency are those sales of cast iron pipe and related commodities purchased in the State of Utah where, in all of the instances here involved, the contractor or his agent, as purchaser, received delivery of the materials purchased from petitioner in the contractor's own trucks at petitioner's plant at Provo, Utah.

8. That the sales in question in most cases were negotiated by representatives of the petitioner outside of the State of Utah.

9. That the materials so purchased were purchased for use on specific out-of-state jobs and were of specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs.

10. That Sales Tax Regulation No. 44 as promulgated by the State Tax Commission provides:

> "Sales made in interstate commerce are not subject to the sales tax imposed by the act. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of sale in interstate commerce. Where the commodity is delivered to the buyer in this state even though the buyer is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to tax.
>
> In determining whether a sale is made in interstate commerce certain general principles will apply. Interstate commerce is not recognized unless there is a movement of a subject commerce from a point within the territorial jurisdiction of one state across the boundary line to a point within the territorial jurisdiction of another. Each of the following three rules must be complied with to constitute interstate commerce:
>
> 1. The transaction must involve actual and physical movement of the property sold across the state line.
>
> 2. Such movement must be an essential and not an incidental part of the sale.
>
> 3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell

to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer.

When tangible personal property is located within the state of Utah at the time of sale and is delivered within the state of Utah such sale is taxable irrespective of where the parties to the contract of sale are located and where the contract was made or accepted or the funds paid. Where tangible personal property is located within the state of Utah at the time of sale, but delivery of the article sold is made at a destination outside Utah and where the seller of the article retains actual physical possession of the article after sale either in person or through an agent until such property is delivered to the purchaser at a destination beyond the boundary of this state, such sale shall be deemed to have been made in interstate commerce and exempt from Utah tax.

Where delivery is made by the seller to a common carrier for transportation to the buyer outside the state of Utah, the common carrier shall be deemed to be the agent of the vendor for the purpose of this section regardless of who is responsible for the payment of the freight charges.

If property is ordered for delivery in Utah from a person or corporation doing business in Utah the sale is taxable even though the merchandise may be shipped from outside the state to the seller or direct to the buyer."

11. That petitioner, as a seller, was not obligated, by the express or implied terms of the contracts herein involved, to make delivery across the state boundary line to the buyer.

From the foregoing findings of fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That the petitioner, under the laws of Utah, is responsible for the collection and payment of sales tax on all items sold by it and delivered to contractors within the state.

2. That the sales transactions which constitute the subject matter of the deficiency assessment are not sales in interstate commerce.

3. That title to all materials purchased from petitioner and delivered to contractors within the State of Utah passed in the State of Utah.

4. That the deficiency against the Pacific States Cast Iron Pipe Company for the period January 1, 1957 to December 31, 1959, together with interest on the principal at the rate of 6 per cent per annum from January 1, 1957 until paid, should be sustained, in the amount of $32,290.18 plus interest.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that the sales tax deficiency assessed against the petitioner be and the same is hereby sustained for the taxable period.

Dated this 23rd day of May, 1961.

BY ORDER OF THE STATE TAX COMMISSION

II. Opinion of the Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 9493

PACIFIC STATES CAST IRON PIPE COMPANY, *Plaintiff*

v.

STATE TAX COMMISSION OF UTAH, *Defendant*.

HENRIOD, Justice:

Review of a tax assessment levied for alleged sales tax liability incident to the sale of pipe to a nonresident purchaser taking delivery, not by common carrier, but in his own equipment at the pipe company's foundry in Utah, delivering it himself to an out-of-state destination designated in the contract. Reversed.

The question: whether, *under the facts of this case*, delivery in Utah to the purchaser, coupled with actual transportation by him to an out-of-state destination transmutes an erstwhile interstate shipment, whose taxability by Utah concededly would be invalid, as being a burden on interstate commerce under the commerce clause,[1] into a taxable intrastate transaction not burdensome to interstate commerce.

It is conceded that had the pipe been delivered to a common carrier consigned to an out-of-state purchaser, the sale would not have been taxable in Utah. Also, that delivery was taken in Utah by the out-of-state purchaser

1. Art. 1, Sec. 8, U.S. Constitution, having to do with federal power "to regulate Commerce . . . among the several states. . . ."

in his own equipment, actually transported from the pipe company's foundry directly, and without interruption, to the out-of-state destination called for by the contract and bill of lading.

It seems to be undisputed also that: The pipe company makes and sells pipe in 11 western states. Delivery mostly is in interstate commerce by common carrier or in the company's own equipment. As has been said, the out-of-state purchaser took delivery here in his own equipment. The contract called for out-of-state shipment, and the pipe company set the destination price which included the going common carrier freight charge between the two points. In this case such tariff was credited to the purchaser. The bill of lading and contract of sale clearly demonstrated an understanding by both seller and buyer that the pipe was to be shipped to an out-of-state destination, to be used on a municipal project, under engineered specifications, federally okayable because of federal fiscal participation. Under such contract, bills of lading and the highly detailed specifications, it was quite improbable, if not almost impossible, to conclude other than that the goods could not be diverted to any other or intrastate consumption. Also, it appears inescapable to conclude from the record in this case, other than that there was no effort or intent to circumvent any tax laws in virtue of the use of any contractual or transportational format designed to deceive. All of the evidence adduced points up a certainty of interstate shipment that would overide any suggestion that the products were to be consumed or stored in Utah. The contract clearly evinced a contemplated interstate shipment. The contention of the Tax Commission that the documnts of sale and transportation were an evasive gesture to avoid taxation, and that the goods *could have been diverted to a local use*, simply is not sustained by the facts since the goods actually

reached their consigned destination. Nor would the cases seem to sustain such a contention.[2] Had they *in fact* been so diverted the most that could be said is that there would have been a contractual breach respondable in damages, and perhaps reflecting a circumstance justifying the imposition of a Utah sales tax on an interstate transaction.

The Tax Commission demurs to the pipe company's contention that the facts of this case unerringly point up an unburdenable interstate shipment, commerce clausewise. It points to several facts which it claims are conclusive of the intrastateness of this sale: 1) that delivery was taken here,[3] that title passed here,[4] and that the risk of loss shifted here. It urges that delivery etc. constituted a "taxable

2. United Fuel v. Hallanan, 257 U.S. 277, 42 S. Ct. 105, 66 L.Ed. 234 (1921): "The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account." Hughes Bros. v. Minnesota, 272 U.S. 469, 47 S. Ct. 170, 71 L. Ed. 359 (1926): "The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation. . . ."

3. The Richfield Oil case, post, negatives this concept.

4. In re Globe Varnish Co., 114 F.2d 916 (1940): ". . . we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or intrastate transaction." The Pipe Line Cases, 234 U.S. 548, 34 S. Ct. 956, 58 L.Ed. 1459 (1914): ". . . the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce." Hughes Bros. v. Minnesota, 272 U.S. 469, 47 S. Ct. 170, 71 L. Ed. 359 (1926): "We do not think it important, for purposes of this case, to decide where title to the timber was at the time the drive began." Spalding v. Edwards, 262 U.S. 66, 43 S. Ct. 485, 67 L. Ed. 865 (1923): "Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use." Also: Dahnke-Walker v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L. Ed 239 (1921).

event" invulnerable to any claimed offense against the commerce clause. Ordinarily it would be right.[5] But delivery here, as a technical matter, cannot transcend the interdictions of the commerce clause, if, piercing the veil of technicality, based on the particular facts here, substance reflects a situation offensive to the commerce clause. We think this case, in substance, pierces that veil.[6]

The Commission relies heavily on International Harvester v. Dept. of Treasury[7] to support its contention. That case, on stipulated facts, simply generalizes that "Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state" would be taxable because of a local taxable event. If that were all we had in the instant case, our decision would be an antithesis, since, to reduce the above commentary to its own words, it simply implies, for example, that if a Utahn visits New York, and buys wearing apparel with the intent of wearing it en route back to and in Utah thereafter, the sale is taxable in New York, inoffensive to the inhibitions of the commerce clause. No corrollary, no analogy applies here. The New York seller is unconcerned as to whether the vestment be worn out in Utah or elsewhere. But if the contract were to ship 1,000 suits of clothes to a retailer in Utah without anything else, the import of such a contractual arrangement would reflect an interstate shipment that if taxed by New York, would do injustice to the traditional and his-

5. McGoldrick v. Berwind-White, 309 U.S. 33, 60 S. Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876 (1940). International Harvester v. Dept. of Treasury, 322 U.S. 340, 64 S. Ct. 1019, 88 L.Ed. 1313 (1944).

6. ". . . substance and not form controls in determining whether a particular transaction is one of interstate commerce . . ." Heyman v. Hays, 236 U.S. 178, 35 S. Ct. 403, 59 L.Ed. 527 (1915).

7. Supra, note 5.

toric concepts anent interstate commerce and its inviolability by local tax burdens. The International Harvester case, its forebears and successors, have provided fuel for a judicial fire over the years with respect to close factual situations, but the instant case in substance lends itself to no factual obscurity or uncertainty of contemplated result, such as to be dominated by that case and any others cited that might confuse, but do not decide the case here. We have that confusion to those who have discussed it, and to their observation appurtenant thereto, a couple of which we refer to the reader for a review of the cases covering this whole field which are discussed better there than space justifies here. If the International Harvester case created any dubitability as to application in the case here, it was laid at rest by its author, who later fathered Richfield Oil v. State Board[9], involving an attempted sales tax imposition on a transaction where oil was delivered to a foreign purchaser's equipment in a local harbor, wherein Mr. Justice Douglas had this to say:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. *But the same degree of certainty may exist though no common carrier is involved.* The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. . . . That delivery marked the commencement of the movement of the oil abroad. It is true . . . that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold

8. New Light on Gross Receipts Taxes, 53 Harvard Law Review; Sales Taxation of Interstate Commerce, Univ. of Detroit Law Journal, Vol. 18, p. 416.

9. 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946).

> of the vessel, it passed into the control of a foreign purchaser *and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to a domestic use.* It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant so long as the certainty of the foreign destination is plain.*"

We think our case is bottomed on facts so certainly pointing up an interstate shipment free from local tax burdens, as to transcend, even, the facts and conclusions reached in the Richfield Oil case. It is the substance of it that counts, — not technicalities of delivery, title or assumption of risk, else the commerce clause would suffer senility and impotence.[10]

Both sides have pointed to our statute[11] and Tax Commission Regulations[12] which purport taxwise to include or exclude a particular transaction. The Regulations, no matter how definitive of what a taxable event is, cannot obfuscate the true purpose and intent of the commerce clause. That clause contemplates facts and substance, and not definitions amounting to legal conclusions. We say this; conceding our disposition to sustain administrative agencies enjoying a greater degree of expertness in their field than do we. But we cannot interpret a conceded factual situation pointing to an interstate shipment, to result in victimization by a regulatory definitional legal conclusion, urged as being controlling over facts defying it. (Emphasis supplied.)

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10. ". . . substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence the mere method of delivery is a negligible circumstance if in substantial effect the transaction *under the facts of a given case* is interstate commerce." Heyman v. Hays, supra.

11. Title 59-15-2, Utah Code Annotated 1953, and subdivisions.

12. Regulations 31 and 44, Utah Sales Tax Regulations.

WE CONCUR:

LESTER A. WADE, *Chief Justice*

E. R. CALLISTER, JR., *Justice*

CROCKETT, Justice: (Dissenting)

I dissent. It has long been held by the Supreme Court of the United States that a state may tax sales made within its borders even though it is the intent of the buyer to remove the items to another state prior to using them.[1] This rule was clearly set forth by Justice Douglas in International Harvester v. Department of Treasury:[2] ". . . a local transaction (sale) is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce," and concluded that "those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it."

I see no reason why the facts of the instant case require a result different from that in International Harvester. In that case the court held taxable "Sales by branches (Pacific States Pipe Co.) located in Indiana (Utah) to dealers and users residing outside of Indiana (Utah), in which the customers came to Indiana and accepted delivery to themselves in this state." The only fact not identical in the case now before us is that some of the buyers were also Utah companies who accepted delivery in Utah but intended to ship or transport the pipe to other states for use there. I submit that this change in the facts, if anything, makes the sales even more clearly taxable by Utah than those in the Harvester case.

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1. See Department of Treasury v. Wood Preserving Corp., 313 U.S. 62; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 331.

2. 322 U.S. 340.

The majority opinion seeks to avoid the long-standing rule of the Harvester case by relying on the case of Richfield Oil v. State Board.[3] But the cases are completely different. The Richfield case, decided three years after the Harvester case, involved the sale for *export* of oil to the government of New Zealand, which was delivered to the purchasers' ships in a California port. The U.S. Supreme Court struck down the attempted taxation of the sale by California on the basis of the export clause of the U.S. Constitution, which provides simply that: "No state shall . . . lay any Impost or Duty on Imports or Exports."[4] In doing so, Justice Douglas, who had authored the opinion in the Harvester case, made it clear that the decision did not run contrary to the law announced in the Harvester case. The latter was governed by the commerce clause of the U.S. Constitution. Its language is general, granting to Congress the power to "regulate commerce . . . among the several states."[5] As stated above, the Supreme Court has interpreted this to mean that while interstate commerce may be required by the states to pay its own way, no state may encroach upon the power of Congress to regulate it by placing an undue burden on the interstate flow of goods. Whereas, in the Rockfield case, the court was not concerned with the reasonableness of a burden, but only with the simple and direct prohibition against imposing a tax on exports.

Justice Douglas pointed out that the two constitutional provisions, while related, are not exactly the same. He elaborated on the reasons for the different rules thus:

". . . the law under the Commerce Clause has been fashioned by the Court in an effort to reconcile

3. 329 U.S. 69.

4. Art. I, Sec. 10, Constitution of the United States.

5. Art. I, Sec. 8, Constitution of the United States.

> competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits . . . and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. . . .
>
> It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress."

He further pointed out that this distinction accounted for the different result upholding the Mississippi sales tax in Superior Oil Co. v. Mississippi[6] where the facts were almost identical with those in the Richfield case except that the oil was being transported to Louisiana for resale by the purchaser rather than to a foreign country.

The facts of our case clearly show sales made in Utah which have been held unequivocally by the U.S. Supreme Court to be a "taxable event"; and that a tax levied on such sales by a state does not run afoul of the commerce power of the Federal Government. I am not aware that there has been any great reluctance on the part of the appropriate agencies of the Federal Government to exercise their authority or to assume the full measure of their responsibility. No reason is suggested, and I think none exists, why this court should be over-solicitous in extending federal controls over business transactions within this state.

To rule that where a sale is made in Utah it is not subject to a sales tax merely because the item purchased is to

6. 280 U.S. 390.

be taken to another state, would open an avenue to easy avoidance of the tax by the customer simply declaring his intention to take the purchase elsewhere; would provide a basis for charging tax to some customers and not others; would give rise to untold mischief in administration and to extensive loss to the state of revenue to which it is entitled.

The difficulties just pointed out and the unreasonableness and impracticality of the majority's conclusion is further emphasized by the fact that adjoining states have a use tax law, similar to our own, which provides that property brought into the state is subject to a use tax, equivalent to the sales tax, but exempts the property from the use tax if a sales tax is paid.[7] Thus under the majority decision, Utah would lose the sales tax on these transactions made within our state to which the state is entitled, and the equivalent tax would be collected by a foreign state. On the other hand, foreign states in all likelihood would collect sales taxes on a similar sales, and when such purchases were brought into Utah, our sales tax could not be collected.[8]

The foregoing emphasizes the propriety and the desirability of adhering strictly to the provisions of our statutes which levy sales tax on "every retail sale of tangible personal propery made within the state of Utah."[9] But they exempt "sales whicl the state of Utah is prohibited from taxing under the Constitution or laws of the United States."[10] It could not be plainer that the legislature intended to tax all sales made within the state insofar as it has authority to do so. It is for the legislature to determine how the taxing power of the state should be used, and it is

7. For discussion of this proposition see Butler v. Tax Comm., Utah ....., 367 P2d 852.

8. Ibid.

9. Sec. 59-15-4, U.C.A. 1953.

10. Sec. 59-5-6, U.C.A. 1953.

not the function of this court to examine the policy behind the tax. It is hardly necessary to point out that the residium of power rests with the states and is limited only by those expressly granted by the Federal Constitution to the Federal Government.[1] The United States Supreme Court is the final authority in interpreting that document. When it has spoken and laid down a clear rule regarding the commerce clause which governs the issue here presented, it is not our prerogative, nor should it be our desire to redefine those limits ascribing additional controls over activities within our state.

The Tax Commission, upon competent evidence, expressly found that the transactions in question were sales made within the State of Utah. That finding is unassailable and the tax is payable. The decision should be affirmed. McDONOUGH, J. concurs in the views expressed in the opinion of Mr. Justice Crockett.

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11. Amendment 10, Constitution of the United States.

III. Judgment of the Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

Regular October Term, 1961

February 20, 1962

No. 9493

PACIFIC STATES CAST IRON PIPE COMPANY, *Plaintiff*,

v.

STATE TAX COMMISSION, *Defendant*.

Judgment

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged, and decreed that the order of the State Tax Commission be, and the same is, reversed.